SERVED: October 10, 2007

NTSB Order No. EA-5323

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of October, 2007

APPLICATION OF	)	
THOMAS BANCROFT SHAFFER	)	Docket 320-EAJA-SE-17764
For an award of attorney fees and expenses under the Equal Access to Justice Act	)	

OPINION AND ORDER

Applicant appeals from the initial decision of Administrative Law Judge William A. Pope, II, served on October 12, 2006, denying applicant's Equal Access to Justice Act (EAJA) application.[1] We deny the appeal.

By his application dated August 18, 2006, applicant sought to recover certain fees and expenses incurred in connection with

[1] A copy of the law judge's initial decision and order is attached.

his unsuccessful defense against the Administrator's June 16, 2006 emergency order of revocation of all of his airman certificates.[2] The law judge denied the EAJA application because he found applicant was not, as required by EAJA and our implementing regulations, a prevailing party.[3]

Applicant failed to perfect his appeal by filing a timely appeal brief. Applicant's appeal brief was due 30 days after the service date of the law judges decision, or, in other words, it should have been served by November 13, 2006. 49 C.F.R. §§ 821.48(a); 826.38. Applicant's appeal brief, however, was not served until November 15, 2006, according to the certificate of service. Under our rules, applicant's appeal is subject to dismissal without a showing of good cause for the untimely appeal brief, but respondent offers no explanation for his tardiness. 49 C.F.R. § 821.48(a). Therefore, because applicant's appeal was not properly perfected with a timely appeal brief, and good cause for the lack of timeliness has not been demonstrated, applicant's appeal must be dismissed. See e.g., Administrator v. Hooper, 6 NTSB 559, 560 (1988) ("[the

[2] See Administrator v. Shaffer, NTSB Order No. EA-5244 (2006) (affirming revocation of airman certificates held by respondent on account of reckless and "deliberat[e] maneuver[ing] [of] his aircraft in a manner that created repeated collision hazards and demonstrated a blatant disregard for safety").

[3] See 5 U.S.C. § 504; 49 C.F.R. § 826.5.

Board] intends to adhere uniformly to a policy requiring the dismissal, absent a showing of good cause, of all appeals in which timely notices of appeal, timely appeal briefs or timely extension requests to submit those documents have not been filed"); Application of Riggs, NTSB Order No. EA-5272 (2007) (dismissing appeal of initial EAJA decision because appeal brief was filed 5 days late).

Nevertheless, we note that even if we were to reach the merits, we would adopt the law judge's conclusion. Applicant's argument on appeal, and the purported basis for his EAJA claim, is based, essentially, upon his rationale that because the Administrator withdrew portions of the complaint during the hearing, applicant, *a fortiori,* prevailed as to the withdrawn factual allegations and associated regulatory violations. This argument has several flaws. First, the law judge's ruling to affirm revocation (albeit on the basis of fewer factual and regulatory charges) accomplished the full purpose of the Administrator's litigated order. Applicant does not cite, nor have we found, any Board precedent for awarding EAJA fees to an applicant who suffered the ultimate sanction of revocation.[4] Second, applicant has not established that the Administrator's

[4] See Application of Swafford and Coleman, NTSB Order No. EA-4426 at n.26 (1996) (applicant has burden of proof on the prevailing party issue).

voluntary withdrawal of portions of the complaint should, under the circumstances here, confer prevailing party status as to the abandoned charges.[5]

In sum, applicant's appeal is dismissed for failure to file a timely appeal brief.

ACCORDINGLY, IT IS ORDERED THAT:

Applicant's appeal is dismissed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

[5] See Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598 at 605 (2001) (prevailing party is one who achieves a "judicially sanctioned change in the legal relationship of the parties"); Crabill v. Trans Union, 359 F.3d 662 at 666 (7th Cir. 2001) ("[t]he significance of the [Supreme Court's] Buckhannon decision … [i]s its insistence that a plaintiff must obtain formal judicial relief, and not merely 'success,' in order to be deemed a prevailing … party"); Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Dep't of Energy, 288 F.3d 452 at 456-457 (D.C. Cir. 2002) ("to become eligible for an award of attorneys fees, [plaintiffs] must have been awarded some relief by a court, either in a judgment on the merits or in a court-ordered consent decree") (internal quotations and citations omitted); cf. American Disability Ass'n, Inc. v. Chmielarz, 289 F.3d 1315 at 1320-1321 (11th Cir. 2002) (party that achieves voluntary settlement can be deemed a prevailing party, consistent with Buckhannon, *provided* the court approves settlement agreement and expressly retains jurisdiction to enforce its terms, which is tantamount to a consent decree) (emphasis added).